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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL DANIEL MENDOZA, Appellant.	)	2 CA-CR 2007-0309 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063613

Honorable Nanette M. Warner, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt — Tucson
Attorneys for Appellee

Jeffrey G. Buchella — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Michael Mendoza was convicted of one count of second-degree burglary and one count of theft. On appeal, he argues the trial court erred by admitting evidence of a telephone conversation overheard by the victim and by imposing sex offender probation conditions. He also alleges several instances of prosecutorial misconduct. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the conviction. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). On the morning of September 9, 2006, C. awoke to find an intruder in the hallway of her home. She returned to her bedroom, got dressed, and walked through the house. The intruder was no longer inside the home. When she discovered her cell phone and about twenty-five dollars in cash were missing, she called 911 from her house telephone. About forty-five minutes later, before the police arrived, C. saw the intruder standing on her back porch, looking in a living room window. She then saw him peering through a second window at the side of the house. She went outside with her dog and chased the intruder off the property. At about this time, a neighbor, Paul, saw a man running around the corner of his house.

¶3 That evening, Paul and another neighbor, Herman, were among the guests at a party at C.'s house. When C. and Paul had recounted the morning's events, Herman believed their description of the intruder matched Mendoza, who was a friend of his two sons, Joey and Danny. Herman left the party and returned with some photographs he had

taken the previous week, and both C. and Paul identified Mendoza as the intruder. At some later date, when Joey was visiting C.'s house, C. overheard a call to Joey's cell phone during which "[t]he person on the other end of the line was trying to use Joey to settle the score and get [C.] to accept money for [her] cell phone and the money that was gone."

¶4 Mendoza was charged with one count of second-degree burglary and one count of theft. A jury found him guilty of both counts and found the value of the property Mendoza had taken was less than $250. The court sentenced him to time served for the theft conviction. On the burglary count, the court ordered Mendoza to serve a two-year term in the Department of Corrections (DOC) and suspended the remainder of his sentence, placing him on intensive probation supervision for five years upon his release from DOC. This appeal followed.

Discussion

Admission of telephone conversation

¶5 Mendoza first argues the trial court erred in admitting evidence of statements he allegedly made to Joey during the cell phone conversation that C. overheard. At trial, Mendoza moved in limine to exclude the telephone conversation. The court precluded C. from testifying to Joey's side of the conversation, finding that it "d[id]n't come under any exception to the hearsay rule" but permitted her to testify to statements made by the caller. Mendoza contends there was insufficient evidence establishing he was the caller, and therefore his expressions of remorse and offer to pay $500, apparently compensation for

having taken C.'s cell phone and cash, were inadmissible hearsay. We review a trial court's decision on the admission of evidence for an abuse of discretion, *State v. Atwood*, 171 Ariz. 576, 634, 832 P.2d 593, 651 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001), and will uphold its decision "if it is correct for any reason," *State v. Rojas*, 177 Ariz. 454, 460, 868 P.2d 1037, 1043 (App. 1993).[1]

¶6 An admission made by a party is non-hearsay under Rule 801(d)(2), Ariz. R. Evid. *Atwood*, 171 Ariz. at 635, 832 P.2d at 652. For "statements to qualify under the party . . . exemption[], there must, of course, be evidence that they were made by the party." *United States v. Arteaga*, 117 F.3d 388, 395 n.10 (9th Cir. 1997); *see State v. Schad*, 129 Ariz. 557, 570, 633 P.2d 366, 379 (1981). However, the "'[c]onnection between a telephone call and the caller may be established circumstantially.'" *Cavanagh v. Ohio Farmers Ins. Co.*, 20 Ariz. App. 38, 44, 509 P.2d 1075, 1081 (1973), *quoting Carbo v. United States*, 314 F.2d 718, 743 (9th Cir. 1963); *see also State v. Rienhardt*, 190 Ariz. 579, 588, 951 P.2d 454, 463 (1997). A trial court does not abuse its discretion by admitting a statement as a party admission when "'the proof is such that [a reasonable] jury . . . could

[1]The trial court apparently admitted the evidence as "a statement against pecuniary interest," pursuant to Rule 804(b)(3), Ariz. R. Evid. However, given the court's finding that the jury reasonably could conclude the statements had been made by Mendoza, it could more appropriately have admitted them as party admissions under Rule 801(d)(2), Ariz. R. Evid. And, "[p]arty admissions require no external indicia of reliability." *State v. Garza*, 216 Ariz. 56, ¶ 41, 163 P.3d 1006, 1016 (2007). We thus review whether the statements were admissible on this basis.

find its authorship as claimed by the proponent.'" *Cavanagh*, 20 Ariz. App. at 43-44, 509 P.2d at 1080-81, *quoting Carbo*, 314 F.2d at 743.

¶7 In *Rienhardt*, our supreme court rejected the defendant's contention that the trial court had erred by permitting a witness to testify about a telephone conversation with a person the witness believed was the defendant. 190 Ariz. at 587-88, 951 P.2d at 462-63. The witness had not heard the defendant's voice before this particular conversation and the caller had not identified himself. Nevertheless, the supreme court concluded there was sufficient circumstantial evidence establishing the caller was the defendant, justifying the admission of his statements through the witness, pursuant to Rule 801(d)(2). *Id.*

¶8 Here, the trial court found "the argument that [the caller] is [Mendoza] is certainly something that can reasonably be drawn from all the circumstances." The state presented evidence that Joey and Mendoza had been friends. In addition, evidence was presented that Joey's family was connected with Mendoza through his church, and the caller told Joey he "was trying to get right with the Lord." Furthermore, both C. and a neighbor identified Mendoza in court as the burglar, and the caller's references to the cell phone and the money and his apparent desire to resolve matters with C. indicated that the caller was the burglar. Although this evidence was not overwhelming, it was sufficient for the jury to reasonably infer that Mendoza was the caller. *See Cavanagh*, 20 Ariz. App. at 43-44, 509 P.2d at 1080-81. The trial court did not abuse its discretion by permitting the witness to testify about the telephone conversation she had overheard.

¶9 Mendoza also suggests the statements were "far too vague" for the court to find they constituted an admission. However, in *Atwood*, 171 Ariz. at 637, 832 P.2d at 654, our supreme court found the trial court did not abuse its discretion in admitting an equally vague portion of a telephone conversation in which the defendant had stated: "Even if I did do it, you have to help me." In that case, the court noted that the defendant "was afforded ample opportunity to impeach [the witness]'s testimony about the conversation, and the weight to be given the evidence was properly left to the jury." *Id*. Mendoza was afforded a similar opportunity in the present case. The trial court did not err in allowing C. to testify to the statements she had overheard.

Prosecutorial misconduct

¶10 Mendoza next alleges that a number of instances of prosecutorial misconduct denied him a fair trial. We will reverse a conviction for prosecutorial misconduct if "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *Atwood*, 171 Ariz. at 606, 832 P.2d at 623. And, "[i]f the cumulative effect of the conduct 'so permeate[s] the entire atmosphere of the trial with unfairness that it denie[s the defendant] due process,' it can warrant reversal even if the individual instances would not do so by themselves." *State v. Velazquez*, 216 Ariz. 300, ¶ 57, 166 P.3d 91, 103-04 (2007), *quoting State v. Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d 368, 405 (2006).

¶11 The state concedes that in two of the instances of conduct raised by Mendoza, the prosecutor "arguably erred." In the first, the prosecutor failed to disclose before trial a photographic exhibit depicting changes in Mendoza's appearance over time and showed it to a witness before Mendoza could object. In the second, during closing argument the prosecutor mentioned that she had attended the University of Texas and that her husband had attended the United States Air Force Academy.

¶12 However, regarding the first instance, Mendoza has failed to show how he was prejudiced by the witness's statement that all the photographs in the exhibit showed "the same person." *See State v. Broughton*, 156 Ariz. 394, 398, 752 P.2d 483, 487 (1988). And, the court sustained Mendoza's objection to the prosecutor's comments at closing and admonished the jury not to consider them; furthermore, it told the jury in its final instructions to disregard any statements made by the attorneys during their closing arguments that were not supported by witness testimony. Alleged prosecutorial misconduct may be cured by the court's instructions, *see State v. White*, 115 Ariz. 199, 203, 564 P.2d 888, 892 (1977), and the court's admonition and its instructions "sufficiently brought home to the jury the proposition that . . . counsel['s inappropriate statements at closing were] to be entirely disregarded by them," *State v. Spain*, 27 Ariz. App. 752, 754, 558 P.2d 947, 949 (1977). "Furthermore, we presume the jury follows the court's instructions." *State v. Gomez*, 211 Ariz. 111, ¶ 15, 118 P.3d 626, 629 (App. 2005). Thus, neither of these instances constitutes reversible misconduct. *See Atwood*, 171 Ariz. at 606, 832 P.2d at 623.

¶13 Mendoza also contends the prosecutor's characterization of the crime as a "home invasion" during voir dire was improper. Although there is no offense of home invasion under Arizona law, our courts—and those states that do have such an offense—generally use the term to refer to a first-degree burglary or an armed robbery where the perpetrator uses force or the threat of force against the occupants of a home. *See, e.g.*, *State v. Cañez*, 202 Ariz. 133, ¶ 94, 42 P.3d 564, 591 (2002); *State v. Swoopes*, 216 Ariz. 390, ¶ 1, 166 P.3d 945, 947 (App. 2007); *see also* 87 C.J.S. *Trespass* § 180 (2008). Thus, to the extent the prosecutor's use of the term home invasion was an insinuation that was not supported by the evidence in this second-degree burglary case, it was improper. *See State v. Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d 519, 529 (2008).

¶14 However, the court sustained Mendoza's objection to the use of the term, indicating it would "instruct the jury on the burglary at the beginning of the case." And, given the court's instructions and the evidence presented to the jury on the actual nature of the crime, we cannot conclude that the prosecutor's single, fleeting reference to home invasion constituted reversible misconduct. *See Atwood*, 171 Ariz. at 606, 832 P.2d at 623; *White*, 115 Ariz. at 203, 564 P.2d at 892. Nor do we find that all the instances of misconduct alleged by Mendoza taken together "so permeated the entire atmosphere of the

trial with unfairness" as to warrant reversal. *See Roque*, 213 Ariz. 193, ¶ 165, 141 P.3d at 405.[2]

Conditions of probation

¶15 Mendoza lastly argues the court erred by imposing sex offender conditions on his probation. We review a trial court's imposition of probation conditions for an abuse of discretion, and we will not find such an abuse unless the conditions "violate fundamental rights or bear no reasonable relationship whatever to the purpose of probation over incarceration." *State v. Turner*, 142 Ariz. 138, 144, 688 P.2d 1030, 1036 (App. 1984). And, because Mendoza failed to object below, we review only for fundamental error. *See State v. Nickerson*, 164 Ariz. 121, 122-23, 791 P.2d 647, 648-49 (App. 1990).

¶16 Mendoza asserts that probation conditions "should be related to the offenses for which a defendant has been convicted." Thus, because his convictions were for burglary and theft and he had no prior convictions for sexual offenses, he argues the court's imposition of "sex-offender evaluation and treatment conditions" was "an inappropriate exercise of [its] discretion."[3] He is mistaken, however. Probation conditions need only be

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[2]Mendoza also contends that comments in the prosecutor's opening statement constituted prosecutorial misconduct because they "invaded the province of the jury." However, he neither develops this argument nor supports it with any authority. We therefore do not consider it. *See* Ariz. R. Crim. P. 31.13(c)(1) (appellant's brief shall include necessary supporting citations); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claim on appeal waived by insufficient argument).

[3]Mendoza also asserts his probation conditions "will result in a significant infringement of [his] fundamental rights to privacy." However, he neither develops this argument nor supports it with any authority. We therefore do not consider it. *See* Ariz. R.

related to the "purpose of probation," *Turner*, 142 Ariz. at 144, 688 P.2d at 1036; they "need not relate to the offense for which [the defendant] was convicted," *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003).

¶17 Here, Mendoza had prior arrests for indecent exposure and attempted sexual assault and a conviction for criminal trespass where he had looked into a neighbor's bathroom window. In the present case, he loitered outside C.'s house after the burglary and peered through her windows. In setting Mendoza's probation conditions, the court expressed its concern about the implications and pattern of Mendoza's behavior and its desire to "make sure [he would] get the kind of treatment that is going to make this community safe." *See State v. Kessler*, 199 Ariz. 83, ¶ 21, 13 P.3d 1200, 1205 (App. 2000) (probation conditions appropriate if "'reasonably related to the ends of rehabilitation and protection of the public from recidivism'"), *quoting United States v. Schave*, 186 F.3d 839, 843 (7th Cir. 1999). Thus, because the conditions of probation related to the purpose of Mendoza's probation, we find no error, let alone fundamental error.

Disposition

¶18 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

Crim. P. 31.13(c)(1); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge